ADMINISTRATIVE CANCELLATION OF THE FEDERAL OIL AND GAS LEASE: A SHOT HEARD 'ROUND THE WORLD?

by

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A Thesis Presented to the Faculty of the Graduate School

of

Southern Methodist University

in

Partial Fulfillment of the Requirements

for the degree of

Master of Laws

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Administrative Cancellation of the Federal Oil and Gas Lease: A Shot Heard 'Round the World?

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Master of Laws degree conferred August 21, 1970

Thesis completed April 13, 1970

The thesis analogizes the federal oil and gas lease on public land in the United States to the oil concession granted by governments to foreign oil producers. To establish the analogy, it describes the federal lease and the concession in a general way, noting the similarity in the documents themselves and the physical facts which motivate the respective parties to enter into them. It examines in more detail the nature of the domestic law applicable to the federal lease and the national bodies of foreign and multi-national law which might be applicable to the overseas concession under various theories. This examination is particularly concerned with the avenues by which municipal law foreign to the country granting a concession may affect the bodies of law defining the rights of the producing company, inasmuch as the ultimate objective of the thesis is to assess the possible effects of certain aspects of

American municipal law of the federal lease on the law of the overseas concession.

The result of that assessment is the conclusion that Supreme Court decisions (notably Boesche v. Udall, 373 U. S. 472 (1963)) allowing administrative cancellation of issued federal leases for causes not specified by statute bode ill for the sanctity of the overseas concession, as well as for title security under the federal lease itself. This leads to the suggestion that the Supreme Court should, in an appropriate future opinion, correct such statements as might be subject to the interpretation abroad that American law endorses the sweeping theories of sovereignty by which states are prone to justify their unilateral modification or abrogation of oil concessions.

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ADMINISTRATIVE CANCELLATION OF THE FEDERAL OIL AND GAS LEASE: A SHOT HEARD ROUND THE WORLD?

INTRODUCTION

Two observations inspired the discussion to follow. One is the similarity between the federal oil and gas lease on public land in the United States and oil and gas concessions issued by foreign governments to operators within their borders. In both, the parties are a government on the one hand, and a private corporation or individual on the other. The objectives of the parties are about the same and the documents they use to reach those objectives are similar. The other observation is that the internal or municipal law of the United States can affect other bodies of law having a multi-national character. The inference to be drawn from these observations is that developments in the municipal law of the United States which defines the nature of the federal lease may somehow be echoed as analogous developments in those other bodies of law which, owing to the diverse nationalities of the parties, define the nature of the overseas concession.

The 1963 decision of the United States Supreme Court in the case of Boesche v. Udall confirmed the Secretary of the Interior in his

cancellation of a federal oil and gas lease by purely administrative action not specifically authorized in the statutory framework for the leasing of public lands.[1] In so doing, the Court altered, expressly and by implication, what had been supposed to be the basic legal nature of the interest held by a federal lessee. It is the task of this paper to characterize that alteration in the federal lessee's legal interest, to trace the routes by which it can affect the bodies of law defining the overseas concessionaire's interest, and to assess those effects.

To accomplish its task, the paper undertakes to describe both the concession and the federal lease in a general way, and to examine in detail their legal natures as revealed by the bodies of law which set the conditions of their existence. In the case of the overseas concession this requires a fairly lengthy discussion of the several bodies of law which may apply, together with the occasions of their application. This done, and the analogy between the federal leases and the concession established, the discussion centers on the results which might actually be expected if the Boesche decision sends ramifications into the legal environment of the overseas concession.

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[1] 373 U. S. 472 (1963).

LAW OF THE OVERSEAS CONCESSION

Nature of the Concession

The mineral resources of the world, including its hydrocarbon resources, are not uniformly distributed over its surface. Nor are capital resources held uniformly among the world's peoples. Geological accident has put most of the world's petroleum in the "underdeveloped" nations, whose capital structures are unable to support the expensive process of extraction. The industrialized, capital-rich nations must generally look outside their borders for the diet of petroleum resources necessary to feed their economies. These facts of life on this planet have given rise to international cooperation for the utilization of oil, ordinarily evidenced by "concessions." Through the oil concession a capital-poor nation trades part of its oil for cash and the economic development obtainable through the agency of an oil company from a capital-rich nation. Writers have been unable to reach agreement on the exact nature of concession agreements. They are not treaties; only one of the parties is a state. Yet, they have undeniable international aspects and the oil company's state will frequently have at least an indirect hand in the performance of concessions. Moreover, the effect of a concession agreement is very similar, in some senses, to the conveyance of an estate in real

property.[2] At any rate, it is an agreement, not something the state had no choice about granting. If the granting state had no discretion, the grant is not a true concession, in the legal sense.[3] "Concession," then, is a poor word for the agreement, connoting as it does some sort of compulsion applied to the granting state. Company executives refer to the Iranian Consortium Agreement as "an agreement without a name."[4] "Economic development agreement" has been suggested and seems satisfactory.[5] Nevertheless, this paper will continue the use of "concession," which is the most common appellation and has withstood the test of time, if not of logic.

The basic motivating force behind the concession is the existence of natural resources the granting state wants to dispose of. Naturally, it wants the maximum possible return, and the concession has

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[2]Kissam & Leach, Sovereign Expropriation of Property and Abrogation of Concession Contracts, 28 FORDHAM L. REV. 177, 194 (1959).

[3]Carleton, International Role of Concession Agreements, 52 NW. U. L. REV. 618, 621 (1957), citing, Huang, Some International and Legal Aspects of the Suez Canal Question, 61 AM. J. INT'L L. 277 (1952).

[4]D. FINNIE, DESERT ENTERPRISE 20 (1958).

[5]G. RAY, LAW GOVERNING CONTRACTS BETWEEN STATES AND FOREIGN NATIONALS 13 (1960) (reprint from PROCEEDINGS OF THE 1960 INSTITUTE ON PRIVATE INVESTMENTS ABROAD)[hereinafter cited as RAY].

been found to be the arrangement best suited to that end. An alternative to the concession, quite uniformly rejected, is to confer full ownership of the resources on individuals, relying on their exercise of self-interest to benefit the national economy generally.[6]

An oil and gas concession is a grant by the state of the right to seek, extract, and sell oil. The inducement offered the company is the possibility of profit from oil production. The state also contributes the promise of protection from interference during the search for and production of oil. In return, the company agrees to explore for oil and, if it is found, to exchange it for money so as to give the state a certain share of the revenue.[7] The state receives additional benefits, which, while not always sought in the concession agreement, are necessarily incident to it. An example is the increase in the pool of educated manpower which results from the training the company provides to the employees it must hire locally.

Modern concession agreements differ in details, but they usually contain provision for the following:

1. the privilege to explore for, extract, refine, and export oil;

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[6]Carleton, supra note 3, at 621.

[7]RAY 16.

2. some initial time limit within which exploration must begin;

3. an effective period, usually very long, e.g. sixty years;

4. a description of the specific area for which the concession is granted;

5. a right to establish systems of transportation and communication;

6. the right to acquire land for company purposes;

7. supply by the company of specific amounts of oil or products for local consumption;

8. the right to establish subsidiary companies;

9. payment by the company of the salaries of state representatives appointed to deal with the company.

10. local hiring of labor, in so far as needed skills are available;

11. reports by the company on operations;

12. local offering of new stock issues;

13. arbitration.

14. payment formulas calling for (a) a lump sum when the concession is granted (bonus), (b) dead rent during exploration, and (c) royalties based on the amount of oil produced and sold, or on profits.[8]

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[8] G. LENCZOWSKI, OIL AND STATE IN THE MIDDLE EAST

The overseas oil concession is a contract, but it is also something more. It grants the right to take and sell a wasting natural resource, and therefore gives not only in personam contractual rights against the granting state, but also vests in rem interests in real property.[9] Moreover, it involves state parties and large foreign corporations. Its subject it a natural resource of unparalleled importance and value to the entire civilized world. These facts give the oil concession an inherently international character, which greatly affects its legal nature.

The Governing Law

The public-private, contract-conveyance, domestic-international hybridization of concession agreements has resulted in a great diversity of opinion among writers as to what law should properly be applied to them. Cattan lists as possible choices the lex contractus, the municipal law of the contracting state, the principles of law common to the parties, the general principles of law recognized by civilized nations, public international law, and administrative law.[10] The

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64-69 (1960); see generally H. CATTAN, THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA (1967).

[9]S. SIKSEK, THE LEGAL FRAMEWORK FOR OIL CONCESSIONS IN THE ARAB WORLD 8 (Middle East Oil Monograph No. 2, 1960).

[10]H. CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA 33 (1967).

discussion to follow will omit a separate consideration of administrative law. The features which set it apart from municipal law in general are important only to civil lawyers, and are not important to the purposes of this paper. Changing the sequence of Cattan's listing, the applicability of the municipal law of the contracting state will be discussed first.

Since a concession is ordinarily negotiated, signed, and performed in the granting state, the most obvious choice of a body of law to construe it is the domestic law of that state. Indeed, there is authority for the proposition that it is the only possible choice. That theory proceeds on the argument that there are only two kinds of law, international law and municipal law. Since international law applies only to dealings between sovereign states, a concession contract necessarily falls within the realm of municipal law.[11] It has also been argued that the domestic law of the contracting state should be presumed applicable in the absence of a contrary expression of intent in the agreement.[12] But

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[11] See Kissam & Leach, supra note 2, at 195.

[12] "[I]t is generally admitted in private international law that a sovereign State is presumed, unless the contrary is proved, to have subjected its undertaking to its own legal system . . . ." Saudi Arabia-Aramco Arbitration Award (1958), quoted in H. CATTAN, supra note 10, at 39.

concessions are often executed by states having a poorly developed local jurisprudence, and it is usually required, somehow, to bring in another body of law to resolve disputes.[13]

Public international law has been argued to be directly applicable to the breach by a state of its contract with an alien.[14] However, the better view is that no international wrong has been committed until a state not only breaches a contract but also denies the offended alien the opportunity to have his case properly adjudicated.[15] In such a situation the international wrong occurs not because international law applies to the contract, but because it forbids unjust treatment of aliens. Professor Jennings has suggested that it is illusory as a practical matter to say that international law does not provide a direct, contractual remedy for state breaches of contracts. He points out that the finding of an international delict in a contract case requires a determination as to whether the state acted arbitrarily. This determination necessitates construction of the contract to ascertain the rights it gives the parties. Thus, he feels an international law of contracts may be found "secreted

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[13] See generally P. JESSUP, TRANSNATIONAL LAW 81 (1956).

[14] Mann, State Contracts and State Responsibility, 54 AM. J. INT'L L. 572, 590-91 (1960).

[15] Amerasinghe, State Breaches of Contracts with Aliens and International Law, 58 AM. J. INT'L L. 881, 883 (1964).

in the interstices of the traditional delictual remedy."[16] Nevertheless, the prevailing view is that international law is excluded by definition from application to cases not involving disputes between states.[17] International law rules may enter the arena of concession disputes indirectly, inasmuch as concession agreements often specify international law as an applicable body of law.[18]

The lex contractus provides the most common rationale for the interpretation of oil concessions. The theory is simply that the contract contains within it, either expressly or by incorporation, all the legal rules necessary to its operation.[19] The principle that the contract is the law of the parties has a very long and respectable history. It was enunciated by Ulpian, apparently from earlier sources, in the Third Century A. D. and has been frequently reiterated in later writings, including the Digest of Justinian and the Code Napoleon.[20] Contractual

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[16]Jennings, State Contracts in International Law, 37 BRIT. Y. B. INT'L. L. 156, 165-66 (1961).

[17]S. SIKSEK, supra note 9, at 21; McNair, The General Principles of Law Recognized by Civilized Nations, 33 BRIT. Y. B. INT'L L. 1, 19 (1957).

[18]S. SIKSEK, supra note 9, at 26.

[19]H. CATTAN, supra note 10.

[20]RAY, 25-26.

provisions can override legal rules of the contracting state, and, for this reason contracts have been likened to a constitution for the parties, creating for them a somewhat autonomous legal regime.[21] However, it has been argued with convincing logic that a contract can not exist in a legal vacuum. Its enforceability as a contract depends on some legal system, probably that of the contracting state, which adopts the rules stated or incorporated into the contract.[22]

General principles of law recognized by civilized nations, assuming the insufficiency of local national law, has been suggested as the proper body of law for concession contracts.[23] There is considerable precedent for the use of such general principles in deciding concession disputes. An example is found in this statement of the Arbitration Tribunal in the Saudi-Arabia-Aramco Arbitration:

> . . . .insofar as doubts may remain on the content or the meaning of the agreements of the Parties, it is necessary to resort to the general principles of law in order to interpret, and even to supplement, the respective rights and obligations of the Parties.[24]

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[21] Ray, The Development and Maintenance of an Oil Operation in the Middle East, in LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENT 145, 148 (C. Shaw ed. 1962); Carleton, supra note 3, at 636.

[22] Mann, The Proper Law of Contracts Concluded by International Persons, 35 BRIT. Y. B. INT'L L. 34, 49 (1959); McNair, supra note 17, at 7.

[23] McNair, supra note 17.

[24] Quoted in H. CATTAN, supra note 10, at 65-66.

In that arbitration the general principles were considered applicable by implication. Sometimes the agreements actually provide for the use of general principles. Article 46 of the Iranian Consortium Agreement of 1954 reads, in part, as follows:

> . . . . [the Agreement] shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognised by civilized nations in general, including such of those principles as may have been applied by international tribunals.[25]

Dr. Mann feels, on the other hand, that general principles are not a valid choice of a body of law to apply to concessions because they do not constitute a system of law. He feels they are a source of international law and could apply to a concession only in so far as international law applies to it.[26]

Principles of law common to the contracting parties may also enter into the construction of a concession by being expressly incorporated into the agreement. The above quoted article from the Iranian Consortium Agreement contains such an incorporating provision.

Another theory of the proper law for concession contracts, which does not fit neatly into the categories discussed above, was presented by

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[25] Quoted in S. SIKSEK, supra note 9, at 32.

[26] Mann, supra note 22, at 45.

Frank Hendryx, a Legal Adviser to the Directorate General of Petroleum and Mineral Affairs in Saudi Arabia, in a paper before the First Arab Petroleum Congress, Cairo, 1959. Pointing out that the inadequacies of local law often make it clear that the parties could not have intended its application, he concluded that international law must apply. However, he felt the absence of international precedents dealing with concessions made it impossible to identify true international law with respect to them. This led him to identify international law, in the concession context, with the national law of the United States, England and France.[27]

The Concession Under Foreign National Law

Without going into the occasions and extent of their application, it is important to consider whether the municipal legal systems of the overseas oil producing countries support the binding character of a contract made by a state with a private party. Detailed treatment of the law of each country would be cumbersome and unnecessary. Happily for purposes of discussion, the legal systems of most of the major concession-granting countries fall into either the Islamic or Civil Law categories. Generalizations can be drawn from the law of a country within

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[27] See generally RAY 55-62; S. SIKSEK, supra note 9, at 23-24, 49-54, which discuss and quote the Hendryx paper.

either category which will apply to the other members with fair accuracy. Some of the generalizations about Islamic and Civil Law will be touched on later in connection with the general principles of law defining contractual obligation.

Theoretically, the basic law of any Moslem or Moslem state is the Shari'a, the Sacred Law of Islam, distilled from the Koran and Sunna(Practice of the Prophet). However, it is by no means accurate to assume that the ideal of the Shari'a is predictive of the practice of modern Moslem states in their treatment of concession contracts. Those contracts are a species of agreement which the Shari'a predates by hundreds of years. On the other hand, Shari'a should not be ignored, even in assessing the law of states which have adopted codes based on modern European models. In the states of the Arabian peninsula Islamic law still reigns virtually supreme, and in all Moslem states jurists have shown an increasing tendency to invoke Islamic principles. Therefore, a study of those principles can provide a key to understanding the specific legal rules Moslem countries may seek to apply to concessions.[28]

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[28]Anderson & Coulson, The Moslem Ruler and Contractual Obligations, 33 N. Y. U. L. REV. 917, 920 (1958); Schacht, Islamic Law in Contemporary States, 8 A.M. J. COMP. L. 133, 133-36 (1959).

There is no room for doubt that the Shari'a recognizes the existence of contracts and enjoins Moslems strictly to observe their contractual undertakings.[29] The sources of the Shari'a provide numerous examples of statements supporting this proposition. Contemporary Moslems habitually quote the Koran as follows: "Oh you who believe, observe your covenants."[30] Or, similarly, "Observe the covenant. Verily, of the covenant enquiry shall be made."[31] Both of these statements have been interpreted to apply generally to all human contracts in addition to covenants with God.[32] In the same vein, Sunna says,"Moslems are bound by their stipulations."[33] While it is necessarily impossible for the letter of the Shari'a to apply to concession contracts, its applicability in spirit is unmistakable.

It is also undoubtedly true that Islamic law binds the ruler to his contracts as much as any other Moslem, and possibly more so. Islamic law has an individualist structure which does not make a clear distinction between the official and personal capacities of a ruler. Thus,

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[29]J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 144 (1964).

[30]Anderson & Coulson, supra note 28, at 929, quoting Sūra, V, 1.

[31]Id. at 924, quoting Sūra, XVII, 34, 36.

[32]Id. at 923-24.

[33]Id. at 925, quoting Bukharī, Sahīh III, 187.

like any Moslem, he has the duty of respecting the rights of the other party to a contract he makes. As a ruler, he has the additional duty of upholding the law and is therefore obligated to safeguard contractual rights which the law gives the other party.[34] Claims of sovereign prerogative can not, in theory, support the Moslem ruler who fails to fulfill his contractual promises. The Shari'a is considered the transcendent law of God, to which the ruler is subject. He only executes the law, he does not make it.[35]

The general proposition that binding contracts may be formed in civil law countries is virtually a truism. Whether these states may bind themselves to concession contracts irrevocably, and the circumstances under which they may seek to avoid their contractual commitments will be fully discussed in connection with the concession's position under international law. At this point it is important to point out only that, unlike the Moslem ruler, who has the right to grant concessions as custodian of the state's minerals, the usual South American sovereign requires domestic legal authority to do so. Many of these states, including Venezuela, recognize by constitutional or legislative provision state ownership of minerals and provide for the right of the

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[34]Schacht, supra note 28, at 144.

[35]Anderson & Coulson, supra note 28, at 928.

state to exploit them by granting concessions.[36]

The Concession and the Law of the Contract

In the literature dealing with contracts between states and foreign nationals it is stated and restated that the contract is the law of the parties. Sometimes the law of the contract is put forward as the whole law of the parties. These frequent statements make necessary a separate treatment of the law of the contract or lex contractus, although, as will be seen, there is much doubt as to its separate status.

Early in his career as General Counsel of the Arabian American Oil Company, George W. Ray, Jr. was told by the King of Arabia that compliance with the law of his country required only reference to the company's contract with the state for guidance, "since that contract was the law of the parties."[37] Professor Megazi of Cairo University expanded on the rule and its effects:

> The meaning of the rule that the contract is the Shari'ah of the contracting parties is that an obligation resulting from a contract is equal in its binding effect to an obligation resulting from the law. Inasmuch as an individual cannot liberate himself from an obligation imposed by law, likewise, it is not permissible for a contracting party to liberate himself from an obligation resulting from a contract to which he is a party.

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[36]Carlston, supra note 3, at 628.

[37]RAY 20-21.

> The rule is based on three different foundations; philosophical, ethical and economic. First, it is based on the principle of the autonomy of the will. A person does not become obligated unless he desires so to be. If he is willing to undertake an obligation, nothing prevents him from doing this. In the second place, it is based on the principle of respect for pacts and covenants. 'Pacts are binding [Koran].' Thirdly, it is based on the necessity for stability in transactions. If contracts did not bind the contracting parties, then people would stop entering into them, uncertainty arises, confidence between individuals disappears and legal situations become perturbed. Consequently, the contract must have binding force in such a measure as to bar either of the contracting parties from cancelling or altering it unilaterally . . .
>
> Since the contract is the law of the contracting parties, it cannot be cancelled or altered unless both parties agree to that or there are legal causes provided for in the law for such cancellations or alteration.[38]

The above represents the Islamic viewpoint, but it accurately reflects the position of a much wider variety of legal systems. The Code Napoleon of 1804, which is ancestral to many of the newer civil codes says at Article 1134:

> Agreements legally formed have the force of law over those who are the makers of them.
>
> They cannot be revoked except with their mutual consent, or for causes which the law authorizes.
>
> They must be executed with good faith. [39]

The view expressed by Professor Hegazi and the view exemplified by the Code Napoleon are both consistent with the proposition

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[38] 2 HEGAZI, GENERAL THEORY OF OBLIGATIONS IN EGYPTIAN LAW 135-36 (1954), quoted in RAY 27-28.

[39] CODE NAPOLEON 310 (transl., R. G. Claitor publ. 1960).

that a contract may make legal rules for the parties. Hegazi seems to lean toward the position that the contract creates a separate legal system, inasmuch as he states it is subject to change only if authority can be found in the contract itself. On the other hand, the quoted article from the Code Napoleon allows revocation "for causes which the law authorizes." This seems more in line with the view that the law of the contract derives its validity from being incorporated into some other legal system. It has been argued both ways. Professor Verdross characterizes concession contracts as "quasi-international agreements." As such, he feels, they create an independent legal order, completely regulating the relationship of the parties, except in so far as gaps in the contractual scheme may be filled by rules of local law incorporated into the legal regime of the contract.[40] Lord McNair grants that a contract may indicate a system of law within which it is intended to operate, but he emphasizes that agreements intended to have a legal effect must be based on an existing system of law.[41]

Picking a proper side to the controversy is not important for present purposes. Either view would allow the parties to specify legal

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[40]H. CATTAN, supra note 10, at 35, citing A. VON VERDROSS, ZEITSCHRIFT FUR AUSLANDISCHES OFFENTILICES RECHT UND VOLKERRECHT 653 (1958).

[41]McNair, supra note 17, at 7.

rules which can have a binding effect on their relationship, whether directly or by incorporation into local law. Oil concession contracts almost always specify the law or principles to be applied. Questions not covered by a specified body of law would usually be covered by local law, under either theory. They differ only in the avenue by which some non-contractual body of law becomes applicable to such questions.[42]

The actual content of the lex contractus must usually be arrived at by following a reference in the contract. As was mentioned previously, concession contracts will ordinarily specify bodies of law for the agreement, such as public international law, or principles of law recognized by civilized nations. Thus it is impossible to engage in a separate discussion of the likely results for concession contracts should a lex contractus theory be followed. The practical effect of a lex contractus theory can be seen by bearing in mind that it is an ever present, possibly applicable body of law which gets its norms by absorbing rules contained in other bodies of law, to be discussed hereafter.

Contract Rules of International Law

The applicability of public international law to concession contracts has already been discussed. Assuming its applicability directly or through express choice of the parties, the specific rules of interna-

[42] H. CATTAN, supra note 10, at 38.

tional contract law will now be considered. The two great rules permeating the literature of state responsibility for contractual undertakings are Pacta sunt servanda and its corollary, the doctrine of acquired rights.

Pacta sunt servanda, the principle that contractual promises are to be observed, is a truism whichwould seem to be a sine qua non of any legal order. It is a well established rule of international law. But it has had a somewhat checkered history, and it is not yet completely out of danger.

The principle has been traced back to the peoples of the ancient East. These people felt the deity accorded protection to contractual promises, and divine participation in the enforcement of contracts continued through the time of the Romans. Islamic law still makes fidelity to promises a religious requirement and, in a less obvious way, the same requirement can be discerned in the Christian view of contracts.[43] The period of the Renaissance brought different theories elucidating the concept of sovereignty, some of which lent themselves well to arguments opposing the sanctity of state contracts.

One such theory was the "Reason of State" put forward by Machiavelli to excuse sovereign acts contrary to law and justice when

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[43] Wehberg, Pacta Sunt Servanda, 53 AM. J. INT'L L. 775 (1959).

such acts were deemed necessary to the interests of the state. While Machiavelli's views had but a small effect on the thinking of his own era, they remain high in the esteem of the advocates of power politics.[44]

Jean Bodin expressed what has become a famous theory of sovereignty in De la Republique (1577). He said that the sovereign was supreme and independent of state laws, that no law was immune to change under the pressure of necessity, and that no act connected with the welfare of the state could be discreditable. This would seem to support the view that the international obligations of a state continue only as long as it is in the interest of the state to abide by them. However, Wehberg points out that the social context of Bodin's writings makes such an interpretation of his views unwarranted. Actually, Bodin sought only to defend the authority of the French political state against the then threatening Church, Holy Roman Empire, and feudal lords. Bodin also stated, "fidelity and loyalty are the very bases of all justice. Not only the State, but the whole human community is held together by them." Nevertheless, Bodin's writings marked the beginning of a controversy on the obligatory nature of state contracts which has continued to the present day. On one side of the controversy writers of a more absolutist bent, like Spinoza, and Hegel, have argued that no law can fetter the

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[44]RAY 39; Wehberg, supra note 43, at 776.

will of a sovereign state. On the other side, writers like Triepel and Anzilotti have argued for law supreme over sovereign will, which makes contracts binding on all who enter into them, including states.[45] Modern authorities usually take the latter position.[46]

Although absolutist sentiments have been generally on the decline in modern times, a very recent resurgence bodes possible evil for the sanctity of international contracts and the continued validity of Pacta sunt servanda. As might be expected, the strongest expressions of absolute state power come from the socialist world. The Russian position has been that no law or principle gives an alien the right to be paid for nationalized property and, similarly, that a sovereign need not keep its word to a foreign citizen. However, this position does not seem to apply to Soviet property. The laws nationalizing foreign property in Bulgaria between 1946 and 1951 excepted Soviet property in every case.[47] It is impossible to stretch any definition of "law" to include the principle that any property may rightfully be taken, "except mine." Still, most emerging nations have a tradi-

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[45] Wehberg, supra note 43, at 777-82.

[46] See generally H. FLEMING, STATES, CONTRACTS, AND PROGRESS (1960); RAY; Carleton, Concession Agreements and Nationalization, 52 AM. J. INT'L L. 260 (1958); Mann, supra note 14; Wehberg, supra note 43.

[47] H. FLEMING, supra note 46, at 63-65.

tional fear of colonialism and socialist "legal" pronouncements, accompanied as they often are by anti-imperialist slogans, could not fail to reach a few sympathetic ears. Other theories which undermine the sanctity of international contracts come from Western scholars whose opinions are entitled to consideration from a legal standpoint, as opposed to a purely political one. Some of these appear to confuse the international law applicable to state contractual obligations with that applicable to expropriation of alien property.

It has become well settled that international law does not prohibit sovereign expropriation of alien property. Further, the lack of prohibition has elevated expropriation to the status of a right.[48] A taking by a sovereign of foreign property pursuant to the right can never be an international wrong in itself, provided the taking is not discriminatory or arbitrary and is followed by compensation.[49] The international responsibility of the state is engaged by a discriminatory taking or a failure to compensate on the theory that it has committed an international delict with respect to a foreign national. However, the

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[48] Id. at 56; Delson, Nationalization of the Suez Canal Company: Issues of Public and Private International Law, 57 COLUM. L. REV. 755, 762 (1957).

[49] The Status of Permanent Sovereignty Over Natural Wealth and Resources 92-96, U. N. Doc. A/AC. 97/5/ Rev. 2 (1962).

validity of the expropriatory act itself is not open to question.[50] Under the questionable view that an alien company's rights under a concession contract are equivalent to property rights unprotected by contract, they become similarly subject to the right of expropriation. Unilateral abrogation of a concession contract by a state would then never result in international responsibility for violation of Pacta sunt servanda itself. At most it could result in a right to reparation from the state in cases of discriminatory or uncompensated abrogation. Another view, which reaches nearly the same result by a different route, says that contractual rights are not within the scope of the law dealing with expropriation, but that neither are they protected by Pacta sunt servanda. Thus, one who loses rights he held under a state contract may expect help from international law only where the state has violated the rule against denial of justice.[51]

As was pointed out previously, the opponents of this view take the position that concession contracts are inherently international in character and are analogous, therefore, to treaties. Just as would be the case with treaties, they argue, breach of a concession contract

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[50] See generally S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953).

[51] Id. at 157.

should result per se in international responsibility under the principle Pacta sunt servanda.[52] Moreover, drawing a strict analogy between contractual rights and property rights ignores the fact that by the very act of signing a concession contract the state suspends its right to "expropriate" for the duration of the contract.[53]

García Amador adopts a very soundly reasoned view somewhere between the extremes of the opinions discussed above. In order to consider whether Pacta sunt servanda as a rule of international law applies directly to state contracts with foreign nationals, he places those contracts into two categories : those which contain no provisions express or implied that they shall be governed by legal principles of an international character, and those which do contain such provisions or an arbitration clause contemplating international types of settlement. Contracts in the first category he would treat as governed by municipal law only. For them, he continues the analogy to property subject to expropriation, with the result that states would become internationally liable only for "arbitrary" breaches. Pacta sunt servanda would apply directly to contracts in the second category in so far as the stipulated body of law-- international law, general principles, principles com-

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[52] P. JESSUP, supra note 13; Ray, supra note 21; Carlston, supra note 3.

[53] H. FLEMING, supra note 46, at 57.

mon to the parties -- contained the rule.

The "doctrine of acquired rights" is the other rule of public international law commonly invoked by those who seek to uphold the sanctity of state contracts against claims of sovereign rights to modify them unilaterally.[54] The doctrine operates as a limitation on state action which destroys or modifies rights previously acquired by aliens. The doctrine is related to Pacta sunt servanda and may even be considered to include that principle, if contractual rights are treated as being different from property rights only in their mode of acquisition. This is the position taken by García Amador. He recognizes the existence of the doctrine of acquired rights in international law and would allow it directly to protect any "public contract" which had been "internationalized" through choice of the parties. Thus, breach of any such contract would result in an immediate international wrong by the state.[55]

Whether or not Pacta sunt servanda and the doctrine of acquired rights can logically be considered separately, they do often receive

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[54]The Status of Permanent Sovereignty over Natural Wealth and Resources 88, U. N. Doc. A/AC. 97/5/ Rev. 2 (1962).

[55]Amador, (Fourth) Report on International Responsibility, [1959] 2 Y. B. INT'L L. COMM'N 1, 3, 24, U. N. Doc. A/CN.4/119 (1959).

separate treatment and the factor which identifies an "acquired rights" controversy is time. Municipal law sets the requirements for the acquisition of a right. Once those requirements are met, the right is acquired and can not be taken away by changes in the municipal law which occur later in time.[56] This rule definitely gives the protection of international law to rights in tangible property. Whether it gives similar protection to rights under concession contracts is still debated.[57] However, opinion seems to preponderate in favor of such protection.[58] Those who oppose the doctrine of acquired rights, either as it applies to concession contracts or on broader grounds, support their objections on arguments of sovereign prerogative. Those arguments were considered previously in connection with the law of expropriation and Pacta sunt servanda.

The state party to an oil concession is often a newcomer to the world of modern economics. As time passes such states tend to become more knowledgeable about the oil operations taking place within their

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[56]S. SIKSEK, supra note 9, at 68.

[57]Amador, supra note 55, at 9.

[58]E. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 178 (1965); S. SIKSEK, supra note 9, at 76.

borders than they were when the concession was signed. Upon learning that the operating company's profits have greatly exceeded what they originally thought possible, these states may be tempted to argue that justice requires changing the contract to accord with economic facts which their earlier immaturity caused them to overlook. To support such an argument, the international law doctrine rebus sic stantibus has been invoked.[59] Like Pacta sunt servanda, it is a doctrine which grew out of the law of treaties. Because of the strong analogy between state contracts and treaties, there should be no objection to applying rebus sic stantibus to such contracts. However, the meaning of the doctrine is usually distorted when it is utilized to justify unilateral state modification of a concession contract.

Broadly speaking, rebus sic stantibus is a recognition of the practical fact that the parties, despite what they say in a treaty, cannot fix for all time the conditions upon which their agreement is based. It gives a party the right to demand release from an obligation when there is a vital change in the circumstances under which the agreement was originally concluded. Beyond this broad statement, the doctrine is ill defined. Moreover, since it is the business of law to enforce, not to destroy contracts, rebus sic stantibus is necessarily subject to important limitations. The limitations are similar to those placed upon the

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[59] G. LENCZOWSKI, supra note 5, at 95.

analogous municipal law doctrines of frustration of purpose or impossibility of performance as applied to private contracts.[60]

It is certain that rebus sic stantibus is not a principle which allows relief from an obligation which now conditions have made unexpectedly burdensome or even unfair. What it contemplates is change in a condition so fundamental to the agreement that the parties must necessarily have based their understanding on the unchanged continuance of that condition. The changed circumstance must be such that, had the parties foreseen it, they themselves would presumably have said it should cause the agreement to terminate.[61] Even if rebus sic stantibus is applicable and the change in circumstance is vital, it does not allow unilateral abrogation of the agreement. Rather, it justifies a demand to the other party for termination or the initiation of international judicial proceedings. Unilateral abrogation together with a failure to submit to international adjudication can be prima facie evidence that rebus sic stantibus is being invoked as a cloak for what is in fact a breach of international law.[62]

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[60] L. OPPENHEIM, INTERNATIONAL LAW 941 (8th ed. H. Lauterpacht 1955).

[61] J. BRIERLY, THE LAW OF NATIONS 336 (6th ed. H. Waldock 1963); J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 374 (1967).

[62] L. OPPENHEIM, supra note 60, at 941-42; S. SIKSEK, supra note 9, at 91-92; J. STARKE, supra note 61, at 374-75.

General Principles of Law

Along with other sources of law, Article 38 of the Statute of the International Court of Justice calls for reference to "the general principles of law recognized by civilized nations." Thus the "general principles" were expressly identified as a body of law and became an important source of international law. These principles can enter a dispute over a concession either by being specified in the contract as an applicable body of law, or by providing international law with rules to be applied to the concession. Despite the huge importance of the general principles of law, there has been as yet no precise delineation of the actual content of that body of law.[63] Its content can be discussed only in broad terms. Some of the principles have already been described in the foregoing discussion of other bodies of law and will, therefore, simply be catalogued here.

The general principles are usually, although not necessarily, distillations of characteristics found to be common to most developed municipal legal systems. However, it is important to keep in mind that the general principles of law do not incorporate specific rules from any municipal legal system; rather, common legal policies are sought.[64]

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[63] H. CATTAN, supra note 10, at 60; Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 51 AM. J. INT'L L. 734 (1957).

[64] J. BRIERLY, supra note 61, at 63.

Ray includes within the general principles of law Pacta sunt servanda and "The contract is the law of the parties."[65] Garcia Amador feels Pacta sunt servanda should not be included in a state contract context because states have an inherent right to "affect" property, irrespective of the owner's nationality, which includes the right to terminate contractual rights.[66] Later writers do not seem to have quarreled with Ray's inclusion of "The contract is the law of the parties."

Respect for acquired rights has been argued to be one of the general principles of law recognized by civilized nations, as has unjust enrichment.[67] The latter is contained in every legal system in one form or another. It requires restoration by one who unjustly appropriates or receives property interests of another.[68] Estoppel has also been recognized as a general principle, stemming from a universal legal requirement of good faith. The support it could lend to the sanctity of international contracts is obvious.

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[65]RAY 47. See also E. NWOGUGU, supra note 58, at 165.

[66]Amador, supra note 55, at 31.

[67]E. NWOGUGU, supra note 58, 177-81; S. SIKSEK, supra note 9, at 28; McNair, supra note 17, at 16-18.

[68]K. CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY 292 (1962).

The Saudi Arabia-Aramco Arbitration

The 1958 arbitration of a concession dispute between Saudi Arabia and the Arabian American Oil Company (Aramco) provides an excellent illustration of the operation of a fairly typical concession agreement and of the interplay of the various systems of law discussed above.[70]

The concession there involved dated from 1933 and granted Aramco:

> . . .the exclusive right, for a period of sixty years from the effective date hereof, to explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away and export petroleum . . . .[71]

After a lengthy search, oil was discovered and first exported in 1938. Aramco never established marketing facilities outside Arabia. Instead, it sold its entire production to its parent companies, pursuant to "off-take agreements." These companies in turn sold the production to other buyers. The typical transaction involved delivery by Aramco, from Arabian ports or pipeline terminals, into tankers chartered by the parent companies or other buyers nominated by them. Aramco and its parent companies did not own tankers themselves. Aramco's

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[70]Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 I. L. R. 117 (Arbitration Tribunal 1958).

[71]Id. at 175.

sales were principally effected by means of f.o.b. contracts, whereby title to the oil and risk of loss transferred to the buyer at the permanent hose connections on board the tankers.

In 1954, the Arabian Government entered into an agreement with Mr. A. S. Onassis calling for the establishment by him of Saudi Arabian Maritime Tankers Company Ltd. (Satco). Satco was given a thirty-year right of priority to transport Saudi Arabian oil to foreign ports. Only tankers owned by Aramco and its parent companies as of the time of the agreement were excepted from the priority given Satco. Since those companies did not own tankers, implementation of the Onassis agreement would have destroyed the marketing structure Aramco had built up. The Minister of Finance wrote a letter to Aramco, informing it of the Onassis agreement and directing it to implement its provisions. Aramco refused.

After a failure to settle the dispute by negotiation, the parties drew up an arbitration agreement, calling for the appointment of one arbitrator by each party. The Arbitration Tribunal, consisting of both arbitrators and a referee chosen by them was directed to sit in Switzerland. Article IV of the Arbitration Agreement provided:

> The Arbitration Tribunal shall decide this dispute
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> (a) in accordance with the Saudi Arabian law, . . . in so far as matters within the jurisdiction of Saudi Arabia are concerned;

(b) in accordance with the law deemed by the arbitration tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.[72]

Aramco contended that the exclusive grant given it by the concession agreement included the right to determine how oil should be transported by sea and that the Onassis agreement infringed its rights under the concession agreement. The Arabian Government contended that sea transportation was not included in the exclusive grant and that, even if it were included, Aramco had not exercised its right to transport oil by sea.

The tribunal turned first to the question of the proper body of law to use in construing the concession. In order to decide that question, it was necessary to identify the legal nature of the concession, so that the choice of law rules of private international law could be applied to it. The tribunal recognised that different systems of law view concessions variously as public or private contracts, as creating vested ownerships, or profit a prendre. Islamic law, which the tribunal felt was the proper law to characterize the concession, views concessions unequivocally as contractual, and it does not distinguish between public and private contracts. A variety of choice of law theories can be applied to contracts under private international law: the law of the

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[72] Id. at 231.

forum, the law of the place of performance, the law of the place of contracting, and so on. The tribunal felt the Aramco concession was a contract which was necessarily subject to different bodies of law, because of its inherently international character. The law of Saudi Arabia was felt to be definitely applicable because of the express choice of the parties in the arbitration agreement. However, there had never been oil production in Arabia at the time the concession was signed. Oil and gas jurisprudence was absent from its law. For that reason, the tribunal said:

> The concession agreement is thus the fundamental law of the Parties, and the Arbitration Tribunal is bound to recognize its particular importance owing to the fact that it fills a gap in the legal system of Saudi Arabia with regard to the oil industry. The Tribunal holds that the Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties. . .
> In so far as doubts may remain on the content or on the meaning of the agreements of the Parties, it is necessary to resort to the general principles of law and to apply them in order to interpret, and even to supplement, the respective rights and obligations of the Parties.[73]

The tribunal went on to say that it would ascertain the applicable general principles by looking first to customs and practices of the world oil industry, and second to world case-law and pure jurisprudence. It pointed out that particular importance must be attached in this connection to customs and practices of United States oil producers, inasmuch as the concessionaire company was of American nationality.

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[73] Id. at 168.

As to matters which were inherently outside the jurisdiction of the municipal law of any state, such as transport by sea and state responsibility for violation of international obligations, public international law was held to be applicable.[74]

The tribunal felt the wording of the concession contract and its obvious purpose to grant the right to produce oil in Arabia and sell it abroad fully refuted the Government's contention that the exclusive grant did not include the right to designate modes of transportation to Aramco's buyers. Moreover, it felt the conduct of the parties during the years preceeding the Onassis agreement amply showed that f.o.b. sales were a proper exercise of that right.[75]

Of more importance for our purposes was the treatment given the Arabian contention that the Onassis agreement was made pursuant to the right of the state to regulate its maritime commerce. The tribunal acknowledged that the right to control transportation of anything to and from its territory is an indisputable attribute of national sovereignty. However, it pointed out that the right is not without limitation, saying:

> In the exercise of its sovereignty, the State of Saudi Arabia has imposed restrictions upon itself in order to grant to the concessionary company, for a valuable consideration of the importance

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[74] Id. at 171-72.

[75] Id. at 172-202.

> stipulated in the 1933 Concession Agreement, an exclusive right of transportation by land and sea for a limited period of time. It has guaranteed to the Company that it would not exercise its sovereignty in any way contrary to the obligations it has undertaken towards Aramco and to the rights it has granted. The sovereignty of the State is not limited by some exterior cause; it is the state itself which undertakes the (negative) obligation not to impede the grantee's exercise of its rights. The principle of respect for acquired rights prevents the State from derogating from this undertaking. By signing the 1933 Concession Agreement, the Government has already exercised its rights to supervise the ingress and egress of ships into and from its territorial waters. The exclusive right of Aramco can no longer be modified without the Company's consent.[76]

Thus, the tribunal concluded that the Onassis agreement was ineffective as against Aramco's acquired right, even though a claim of sovereign prerogative had been advanced in aid of that agreement.

LAW OF THE FEDERAL OIL AND GAS LEASE

Nature of the Lease Relationship

Before turning to a discussion of the legal nature and effects

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[76] Id. at 212-13.

of oil and gas leases issued by the United States Government on public lands, reference must be made briefly to the common law of the ordinary lease relationship between a private mineral owner and an oil and gas developer. Federal leases are, of course, created pursuant to statutory authority, but the resultant relationship between the Government and the lessee must still be defined largely in common-law terms. It is not necessary to the purposes of this paper that the discussion of the common-law relationship be too detailed. Our ultimate objective is to compare the American oil and gas lease to the foreign concession in order to determine what effect domestic legal treatment of it might have on broad principles of international law. However important the niceties of Anglo-American property law may be to domestic practice, they are not particularly important to international law, which must distill its rules from the basic features of many diverse legal systems.

Under the domestic legal system of the United States the owner of land is also the owner, in some way, of minerals underlying it. Since oil and gas can migrate horizontally, unlike the hard minerals, there has been some conflict as to whether the landowner should be thought of as owning the oil and gas actually beneath his land at any given time or whether, on the other hand, he owns only a right to take the oil and gas from under his land. Depending on the view followed,

the landowner may have a corporeal or incorporeal interest; but he has a real property interest in either case. This property interest may be transferred with or apart from the land itself in a variety of ways. Here we are concerned with transfers effected by means of the oil and gas lease.

In the typical oil and gas lease, the mineral owner grants the right to enter his land and explore for oil and gas. This right continues for a specified period of time, the primary term of the lease, during which the lessee must drill for oil or pay delay rent. Should oil or gas be discovered, the rights of the lessee continue for as long after the end of the primary term as there is profitable production. The mineral owner reserves to himself a share, usually one-eighth, of the land's production, and the lessee becomes the owner of the remainder. Although not without some logical inconsistencies, the interest received by the lessee is usually classified as a determinable fee in oil and gas. It is a fee because in legal theory, if not physical fact, profitable production, and hence the interest, could continue for ever. It is determinable because the requirements for the continuance of the interest, such as payment of delay rents or the existence of production, are worded as special limitations on the grant. Failure to comply with any limitation results in automatic termination of the lessee's interest and reversion of the fee to the mineral owner. Covenants, express or implied, are also included in the oil and gas lease.

Breach of them ordinarily results in contractual liability and not termination of the grant, in the first instance. The important point for us is that a vested, real property interest is generally held to be conveyed to the lessee at the execution of an oil and gas lease. This is true despite a wide divergence of opinion on the specific attributes of the property interest involved.[77]

Oil leases on United States public lands are controlled by the Mineral Leasing Act of 1920, together with its subsequent amendments.[78] This act represented a departure from the earlier pattern for distribution of Government owned land, which, generally speaking, consisted of complete alienation of the surface and minerals under laws like the Homestead Act of 1862.[79] Congress reserved public mineral lands from sale in 1866 and then, in 1870, prescribed the method for their disposal in the Placer Mining Act. Oil and gas were not specifically mentioned in the Placer Mining Act but such lands were included by as-

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[77] See generally 1A W. SUMMERS, THE LAW OF OIL AND GAS §§ 151-154 (perm. ed. 1954); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 201-212 (1962); Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 7 TEXAS L. REV. 1 (1928).

[78] 30 U.S.C. §§ 181-263 (1964).

[79] Bennett, Public Land Policy: Reconciliation of Public Use and Private Development, in PROCEEDINGS OF THE ELEVENTH ANNUAL ROCKY MT. MINERAL LAW INSTITUTE 311, 314-15 (1966), citing 43 U.S.C. §§ 161-302 (1964).

sumption in the lands subject to placer location. When a location was perfected, title to the minerals passed to the locator absolutely. It was not until the Mineral Leasing Act of 1920 that the Government retained a continuing royalty interest in oil and gas lands distributed to private parties.[80] The original act did not provide for a lease in the modern sense of the term, but rather for a permit to explore for oil and gas. If the search was successful within the prescribed period of time, leases would issue calling for payment of varying fractional royalties to the Government. These leases were not of indefinite duration but their fixed terms could be extended or renewed under certain conditions. Through a process of statutory amendment and practical accommodation the federal lease evolved, by the late 1940s, into something very similar to the typical oil lease between private parties in the United States.[81]

As presently constituted, the Mineral Leasing Act instructs the Secretary of the Interior to lease public land known or believed to contain oil or gas for a primary term of years and for so long thereafter as production is obtained from the land. Lands within a known producing formation must be leased to the highest competitive bidder,

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[80] 4 W. SUMMERS, supra note 77, § 867.

[81] Malone, Oil and Gas Leases on United States Government Lands, in PROCEEDINGS OF THE SECOND ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 309, 313-17, 322-29 (1951).

whereas unproved land is subject to leasing by application, on a noncompetitive basis. Primary terms of five and ten years are specified for competitive and noncompetitive leases respectively. During their primary terms leases are conditioned on payment of a minimum delay rental of 50 cents per acre, due annually in advance. A royalty of 12 1/2 percent is reserved to the United States out of any production obtained. In the case of competitive leases, 12 1/2 percent is stated only as the minimum fraction of production which must be retained as royalty. Subject to exceptions similar to those found in private leases, the federal lease terminates for failure of production in paying quantities after the end of the primary term.[82]

The requirements of federal leases as presently issued were placed in the Mineral Leasing Act by amendment in 1946.[83] Thus, the federal lease in modern form was born at a time when the legal interest created by the typical private lease had been clearly defined by state court decisions. Inasmuch as the lease called for by the Mineral Leasing Act is basically the same as the private lease, it has seemed apparent that it accomplishes about the same transaction as the private lease: the conveyance of a determinable fee estate in

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[82] 30 U.S.C.§§ 226(a)-(f) (1964).

[83] Act of August 8, 1946, ch. 916, § 3, 60 Stat. 951.

in oil and gas. However, the Supreme Court decision in Udall v. Tallman[84] has cast some doubt on the validity of this proposition.

The case involved an executive order withdrawing certain Alaskan public lands from " . . . settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, . . .". The Secretary of the Interior interpreted the order as not covering oil and gas leasing, thereby validating lease applications which had been filed during the effective period of the withdrawal order. In upholding the Secretary's interpretation the Court said :

> "Settlement," "location," "sale" and "entry" are all terms contemplating transfer of title to the lands in question. It was therefore reasonable for the Secretary to construe "or other disposition" to encompass only dispositions which, like the four enumerated, convey or lead to the conveyance of the title of the United States -- for example "grants" and "allotments." . . . an oil and gas lease does not vest title to the lands in the lessee.[85]

If the Court meant to state without qualification that a lease can not constitute a grant or conveyance of any sort of property interest under the Mineral Leasing Act, federal leasehold interests have been completely removed from the common law defining the interests of oil and gas lessees generally. Under such a reading of the above

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[84] 380 U. S. 1 (1965).

[85] Id. at 19.

language, the federal lessee can look only to federal statutes and regulations in order to clarify his relationship to the Government lessor.[86] However, it seems wiser to read the Court's language simply as a reiteration of the Secretary's view together with a statement that his interpretation is reasonable, even if it is not the only possible interpretation. The Court said earlier in the opinion that it could, on review, uphold the Secretary's interpretation as reasonable even if it were not the interpretation the Court itself would make had it been called upon to decide the question in the first instance.[87] In short, the Court said the Secretary was reasonable but not necessarily right in classifying federal leases as something other than conveyances. At the very least, it remains arguable that lessees, under leases from the United States Government, like lessees under [illegible] leases from private owners, hold determinable fee mineral estates and not mere licenses.

Cancellation of the Federal Lease

The Constitution of the United States vests Congress with the power to make all necessary rules respecting public lands.[88]

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[86] See Discussion Note, 22 OIL & GAS REP. 730 (1965).

[87] 380 U. S. at 16.

[88] U. S. CONST. art. IV, § 3.

Congress has delegated this power, in a general way, to the Secretary of the Interior.[89] This general delegation of power has formed the basis for the Secretary's assertion that he is authorized to cancel issued oil and gas leases, under some circumstances, even in the absence of specific statutory authority. The assertion has been upheld.[90]

Broadly speaking, cancellations of federal leases, whether by judicial action or administrative action by the Secretary of the Interior, may be placed in two categories. The first category contains those cancellations which are based upon some defect in the issuance of the lease or fraud by the lessee occurring before issuance. The second category contains cancellations arising from lessee noncompliance with the lease, statutes, or regulations occurring after the issuance of the lease. The former category is by far the more important both because the largest number of cancellations fall within it and

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[89] 43 U. S. C. § 1457 (Supp. II, 1964).

[90] See Blair, The Cancellation of Federal Oil and Gas Leases: An Administrative or Judicial Function?, 51 GEO. L. J. 221 (1963); Holmberg, Oil and Gas Leases on Federal Lands: A Time for Title Security, in PROCEEDINGS OF THE TENTH ANNUAL ROCKY MT. MINERAL LAW INSTITUTE 313 (1965); Stull, The Authority of the Secretary of the Interior to Cancel Non-Competitive Oil and Gas Leases by Administrative Action, in PROCEEDINGS OF THE FIFTH ANNUAL ROCKY MT. MINERAL LAW INSTITUTE 1 (1959), for background to this assertion of administrative power.

because those cancellations have given rise to the greater amount of controversy.[91] The authority for the cancellations of the latter category is spelled out in the Mineral Leasing Act itself. The applicable portion of Section 27, as amended, reads as follows:

> If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of [specified sections], the lease may be cancelled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court . . .[92]

Section 27 deals primarily with lessee violations of maximum acreage limitations. Applicable portions of the more general Section 31, as amended, read as follows:

> . . . any lease issued under . . . this title may be forfeited and canceled by an appropriate proceeding in the United States district court . . . whenever the lessee fails to comply with any of the provisions of [the previously specified] sections, of the lease, or of the general regulations . . . in force at the time of the lease, . . .[93]

> Any lease issued after August 21, 1935, . . . shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . .[94]

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[91] Blair, supra note 90, at 222.

[92] 30 U. S. C. § 184(h) (1) (1964).

[93] 30 U. S. C. § 188(a) (1964).

[94] 30 U. S. C. § 188(b) (1964).

The above provisions appear to authorize cancellation only for post-lease events, and then, save for cases of noncompliance with lease terms before discovery of production, to require resort to judicial process rather than to allow purely administrative cancellation. Yet, around 1950, the Secretary of the Interior began to assert the authority to administratively cancel leases for pre-lease defects. The judicial history of the Secretary's eventual success in that assertion is the subject of the discussion to follow.

This history culminated in the 1963 Supreme Court decision in the case of Boesche v. Udall,[95] which perfected, so to speak, the Secretary of the Interior's right to cancel a federal oil and gas lease because of a pre-lease event.

That case involved an application by Boesche for a noncompetitive lease on eighty acres of federal land in Oklahoma. The application was filed in the appropriate land office on September 11, 1956. At that time one Connell had already filed an application for a lease on an adjoining 40-acre tract, but no lease had yet been issued to him. Right after Boesche's filing, Cuccia and Conley applied for a lease on the entire 120 acres covered by the Boesche and Connell applications, but not yet leased to them. Thereafter, in December, 1956, a lease on the 40-acre tract was issued to Connell and, in November, 1957, a

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[95] 373 U. S. 472.

lease on the 80-acre tract was issued to Boesche. Cuccia and Conley were notified that their application was rejected, whereupon they pursued an administrative appeal, which was successful as to the 80-acre tract. A lease to them over the 80-acre tract was directed in derogation of the Boesche lease, the actual cancellation of which was held in abeyance pending appeal.

There was in effect at the time of Boesche's application an Interior Department regulation saying that offers for noncompetitive leases must cover at least 640 acres "except . . .where the land is surrounded by lands not available for leasing under the act."[96] Citing Natalie Z. Shell, 62 I. D. 417 (1955), the Court pointed out that "not available" in the above regulation had "always been administratively construed to mean lands not available for leasing to anyone."[97] Inasmuch as the lease to Connell had not yet issued as of Boesche's application, the 40-acre tract was still "available," and should have been included in the application. On the basis of this interpretation, Boesche's application was administratively determined to have been invalid and the lease which resulted from it subject to cancellation.

In the form considered by the Supreme Court, Boesche's peti-

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[96] 43 C. F. R. § 192.42 (d) (1955).

[97] 373 U. S. at 474.

tion opposing the administrative cancellation of his lease was based on the language previously quoted from section 31 of the Mineral Leasing Act. The petition contended that section 31 is the exclusive source of the Secretary's authority to cancel leases once issued. Section 31 calls for cancellation through judicial proceedings, the only exception being for cases of noncompliance with lease terms. Since Petitioner's dereliction had not been a failure to comply with the lease, but rather a failure to comply with a departmental regulation, he contended that a judicial proceeding, and not administrative cancellation, was the only course of action open to the Secretary. The Secretary's answer was that his power to cancel a lease lies within his general powers of management of the public domain. That power subsists, he contended, unless withdrawn by the Mineral Leasing Act. Since section 31 requires judicial cancellation only for post-issuance events affecting a lease, it does not affect the power to cancel administratively for pre-issuance events.

The Court agreed with the Secretary that his general powers of management over public lands carried with them the authority to cancel a lease invalid at its inception, in the absence of a specific statutory withdrawal of that authority. In support of this proposition, the opinion cited Cameron v. United States, 252 U. S. 450 (1920) and Pratt v. Humboldt Placer Mining Co., 371 U. S. 334 (1963). Both cases dealt

with administrative cancellation of mining claims for which patents had not been issued. Petitioner argued that these mining claims were equitable interests and that the power of administrative cancellation established by the cases should be confined to such interests. He argued that oil and gas leases conveyed interests more closely resembling the legal interest created by land patents, which, once issued, may be cancelled only in the courts. Although the petitioner was arguing from very solid common-law grounds, the Court chose not to accept his argument. It said the characterization of the interest conveyed by a lease was not important. Rather, the important question was whether "all authority or control" over the land had passed from "the Executive Department."[98] The Court felt such authority did not cease with the issuance of a lease.

> Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuous supervision by the Secretary. Thus, assignments and subleases must be approved by the Secretary, 30 U. S. C. § 187; he may direct complete suspension of operations on the land, 30 U. S. C. § 209, or require the lessee to operate under a cooperative or unit plan, 30 U. S. C. § 226(j); and he may prescribe, as he has, rules and regulations governing in minute detail all facets of the working of the land, 30 U. S. C. § 189, 30 C. F. R., pt. 221. In short, a mineral lease does not give

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[98] 373 U. S. at 477, quoting Moore v. Robbins, 96 U. S. 530 (1877), which stands for the proposition that such control does pass from the Executive Department with the issuance of a patent.

> the lessee anything approaching the full ownership of a free patentee, nor does it convey an unencumbered estate in the minerals.[99]

As a matter of statutory construction, the Court determined that the portions of section 31 of the Mineral Leasing Act relied on by Petitioner required judicial cancellation only for post-lease events and, therefore, did not affect the Secretary's underlying power to cancel administratively for a pre-lease event such as the defect in Boesche's lease application. Further, the Court pointed out, the Secretary had frequently asserted the power to cancel administratively without specific statutory authority, and Congress had not acted to curtail his power.

The Boesche opinion concluded with the observation that "efficient administration of both the public domain and the federal courts" might be adversely affected by transferring the power to cancel from the Secretary to the courts.[100] Because of the magnitude of the federal leasing program, the Court felt it would be impractical to deny the Secretary the power to correct administrative errors by his own action. The Court thought its decision would not result in administrative abuse because, besides administrative rights, final action by the Secretary would always be open to judicial review.

The Supreme Court stated that it considered Boesche v. Udall

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[99] 373 U. S. at 477-78.

[100] 373 U. S. at 484.

important for review because, for one reason, there was a "seeming" conflict between the decision of the Court of Appeals for the District of Columbia Circuit in the same case[101] and the decision of the Court of Appeals for the Tenth Circuit in the case of Pan American Petroleum Corp. v. Pierson.[102] The Supreme Court did not make clear in its opinion whether it saw a real conflict between the two lower court decisions. Certainly there is not a necessary conflict. Boesche said the Secretary may cancel a lease for a pre-issuance failure to comply with regulations, whereas Pan American said he may not cancel a lease for pre-issuance fraud. The Supreme Court expressly limited its decision in Boesche to the type of administrative error actually present in that case. Therefore, it is possible that Pan American is still good law for the proposition that administrative cancellation is not open to the Secretary as a remedy for pre-lease fraud.[103] However, Boesche certainly invalidated broad dictum in Pan American to the effect that the Secretary is completely without authority to cancel

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[101] 303 F. 2d 204 (D. C. Cir. 1961).

[102] 284 F. 2d 649 (10th Cir. 1960), cert. denied, 366 U. S. 936 (1961).

[103] See Pan American Petroleum Corp. v. Udall, 352 F. 2d 32 (10th Cir. 1965), which upheld an administrative cancellation for failure to disclose an agency relationship existing prior to issuance in violation of a regulation, but which did not reconsider the fraud question.

for pre-lease events. [104] Whatever the doubts about its continuing validity, Pan American remains of interest for our purposes because Judge Breitenstein's opinion in the case summarizes the arguments many lawyers and oilmen have advanced against the kind of reasoning indulged in by the Supreme Court in Boesche v. Udall.

In that case the Wyoming State Supervisor of the Bureau of Land Management had alleged that one Davis had fraudulently obtained the issuance and assignment of federal oil and gas leases with the purpose of exceeding acreage limitations, without disclosing an agency relationship, and at a time when Davis was not qualified to hold leases. The Supervisor brought a proceeding to cancel Davis' leases in the Wyoming office of the Bureau of Land Management. Pan American, the holder of some of the leases by assignment, was given notice of the proceeding. Before the date set for the proceeding, Pan American brought suit in the United States District Court seeking to enjoin cancellation of the leases by administrative action. It alleged that there was no authority to cancel federal leases by administrative action and that any such action, taken without authority, would cause it great damage and result in the taking of its property without due process of law. The court agreed that authority to cancel the leases by administrative action was lacking.

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[104] See Holmberg, supra note 90, at 317-22.

As the Secretary of the Interior did later in Boesche v. Udall, the officers of the Bureau of Land Management contended that the power to cancel leases for pre-issuance fraud inhered in the Secretary's general power of supervision of public lands and that sections 27 and 31 of the Mineral Leasing Act had no application. In answer to this contention, the court pointed out that the lease system of disposing of public mineral lands was preceded by a system disposing of all public lands, including mineral lands, by patent. Issuance of a patent terminates administrative control over public lands. The court did not feel there were differences between patents and leases sufficient to justify their being treated differently, without some legislative expression to that effect. In the words of Judge Droitenstein:

> We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land. Under the first theory the lessee gains title to the oil and gas after its severance and under the second the lessee has an ownership of the hydrocarbons in place. Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises. Similarly the issuance of a patent is the last act of the government in disposing of the non-mineral lands in the public domain. Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins.[105]

Except for cases of failure to comply with lease terms, nowhere in the Mineral Leasing Act did Congress authorize cancellation of leases

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[105] 284 F. 2d at 654-55.

by other than judicial action.

The Pan American opinion also emphasized the impairment to the practical operation of the Mineral Leasing Act which would result from administrative cancellations of leases for fraud in their procurement. Secure titles are of extreme importance to oil and gas lessees, who must take substantial financial risks in order to obtain and market production. A federal lease becomes a very insecure foundation for title if it is made to depend on fluctuating governmental policies which could result in action adverse to the lease without limit as to time.

The Pan American opinion considered the earlier case of McKay v. Wahlenmaier, decided in the District of Columbia Circuit,[106] but concluded that it offered no help in reaching a decision. In Wahlenmaier the application for a federal lease which was second in time had been rejected by the Bureau of Land Management and a lease issued to the earlier applicant. Alleging that the earlier applicant was not qualified under statute and regulation, the later applicant sued to have the lease cancelled and a new lease issued to him. The District Court cancelled the first lease and the Court of Appeals affirmed, saying that the Secretary of the Interior had the power to cancel the lease and should have done so administratively in the first instance.

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[106] 226 F. 2d 35 (D. C. Cir. 1955).

The Wahlenmaier decision was considered by the Pan American court to be inapplicable to the facts before it because the case actually resulted in judicial and not administrative cancellation. However, inasmuch as Wahlenmaier reached its result by doing what it said the Secretary should have done in the first place, a finding that the Secretary had the power of administrative cancellation was necessary to the decision. This finding was reached without difficulty by the court. Even the Secretary had doubts about whether he could cancel for a defect in the lease application, " . . .in view of the existing legal relationship of lessor and lessee between the Government and [the first applicant], . . . " He resolved his doubts in favor of the power to cancel administratively for pre-lease violations of statute or regulation.[107] The court had no doubts, and even felt the Secretary took an unduly restricted view of his own powers. Without citation of authority, the court stated in a footnote to its opinion that it thought the Secretary had the right to cancel a lease "improvidently issued" whether or not there was a violation of statute or regulation, especially "when fraud, deception or concealment caused the lease to be issued."[108] This court's case in resolving an issue which was to cause so much controversy in later years might be explained by the fact that the holder of

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[107] Id. at 42, quoting the decision of the Secretary of the Interior in the same case, Hill v. Culbertson (unpublished).

[108] 226 F. 2d at 42 n. 11.

the first lease was not a party to the action. Neither actual party had strong interests in upholding the lease in issue.

Some doubts as to the Secretary's power seem to have arisen in the District of Columbia Circuit by the time Seaton v. Texas Co. was decided.[109] In that case the lease in question had been cancelled administratively on grounds of noncompliance with regulations prior to issuance of the lease. The Secretary's action was struck down on the ground that it constituted clearly improper administrative action. Thus, the question of his general powers of cancellation was avoided by the court. However, an earlier opinion in the case, filed in 1957 and later withdrawn, had said the Secretary was without power to cancel for pre-lease events. The withdrawn opinion had proceeded on the land patent analogy which was also used in Pan American Petroleum Corp. v. Pierson, supra, and was rejected in Boesche v. Udall, supra.

It has been observed that there is inevitable conflict between administrative convenience and common-law stability.[110] While the law seeks to define and protect rights of property through rules of due process, the concern of the administrator is rather with efficiency and the greatest good for the majority. When the line of cases

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[109] 256 F. 2d 718 (D.C. Cir. 1958).

[110] Holmberg, supra note 90, at 314.

previously discussed culminated in the Supreme Court's decision of Boesche v. Udall,[111] a heavy weight was placed in the balance on the side of administrative convenience. The decision freed the Secretary of the Interior to cancel valuable federal leases for defective compliance, during an unlimited length of time before issuance, with regulations the meaning of which depend upon his own virtually unfettered interpretation. The only fetter on his interpretations is the lessee's right to judicial review.[112] But that right must now be of small comfort to a lessee whose title depends on those interpretations. The courts frequently emphasize that administrative officers' interpretations of the statutes they are charged with administering must be treated with great deference on review. The administrator must be "plainly wrong,"[113] or "unreasonable."[114] As was pointed out previously, the Supreme Court stated in Udall v. Tallman that an administrator's construction of a regulation is entitled to even more deference on review than his construction of a statute. Such a con-

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[111] 373 U. S. 472 (1963).

[112] See generally Jaffe, The Right to Judicial Review, 71 HARV. L. REV. 401-37, 769-814 (1958).

[113] McKenna v. Seaton, 259 F. 2d 780, 784 (D. C. Cir. 1958), cert. denied, 358 U. S. 835 (1958).

[114] Chapman v. Santa Fe P. R.R., 198 F.2d 498, 502 (D. C. Cir. 1951), cert. denied, 343 U.S. 964 (1952).

struction is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[115]

Boesche v. Udall, in the course of denying the analogy between oil and gas leases and land patents, said that federal lessee did not divest the Government of title.[116] In upholding the Secretary's exclusion of leases from the category of instruments effecting a "disposition" of public lands, Udall v. Tallman said they do not "vest title to the lands in the lessee."[117] These statements make it doubtful whether the federal lessee can still claim that he has right of property protected by due process. If he does not have such right, but rather has the status only of a licensee, these cases have done great violence to common-law traditions stemming from concepts of the sanctity of contract in general and of the interest created by private oil leases in particular. But an assessment of the effect of administrative cancellation on the domestic law of the United States is beyond the scope of this paper. We now turn to a consideration of the effects it might have on the legal environment of the overseas oil concession.

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[115] 380 U.S. at 16-17.

[116] 373 U.S. at 477-78.

[117] 380 U.S. at 19.

ADMINISTRATIVE CANCELLATION AND THE OVERSEAS CONCESSION

Comparative Law View of the Federal Lease

Recalling the discussion of concessions, we can readily see that there are many avenues by which municipal law rules foreign to the contracting state can enter the arena of dispute over an oil and gas concession. This is true whether the arena is an arbitration tribunal set up pursuant to the terms of the concession agreement itself or a regularly constituted tribunal of an international or domestic nature. Such foreign law may enter a dispute directly in two situations: where a choice of law rule of private international law points to the law of some foreign state, say that of the company's incorporation, as the proper law for construction of some part of the concession contract, or where a concession contract specifies some body of foreign municipal law as applicable to it. The former situation is unlikely to occur, inasmuch as concession contracts are ordinarily negotiated, signed, and contemplate performance within the contracting state. The latter situation is more common, and is exemplified by the specification of law common to the parties found in the Iranian Consortium Agreement

of 1954.[118] The indirect avenues for the entry of foreign law into concession disputes are more numerous.

We have seen how the legal environment of the concession may include public international law. It may enter concession disputes which arise from unilateral action by the contracting state taken in such a way as to constitute an international delict. Even in the absence of delictual state conduct, international law may apply to disputes under the view that concession contracts are inherently international in character. The concession's legal environment may also include t. e general principles of law recognized by civilized nations. They may be included in their own right as a separate body of law or as a source for the rules of public international law. Either international law or the general principles of law may be specified in the concession as being applicable. In that case they enter the decision of disputes under the guise of the lex contractus. Even where the local law of the contracting state is held to be exclusively applicable, rules from international law and the general principles are frequently incorporated into it in order to fill gaps in its development.

Municipal law is an important source of the rules of public international law. International law uses the rules of municipal law applicable to individuals within particular states to derive, by a

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[118] See p. 12 supra.

process of analogy, rules applicable to states in their dealings with each other.[119] Almost by definition, the "principles of law recognized by civilized nations" is made up largely of rules distilled from the common elements of the various municipal legal systems.

The lawyer searching among municipal legal systems for rules to include within the international law or general principles of law applicable to concessions would find United States precedents especially persuasive, if not almost controlling. The United States is virtually the only large, developed country which has a long history of oil and gas production within its own borders. Consequently, it has by far the best developed system of municipal law dealing with that subject. Moreover, United States corporations control a vast share of world oil production under concession agreements made with them or their subsidiaries. It would be extremely difficult for such a corporation to argue the irrelevance of an American precedent to the construction of its concession. Conversely, it seems inevitable that those representing the interests of the state would argue for the inclusion of American law within the body of law application to the concession, if that law were favorable to their position. American precedents authorizing administrative cancellation of federal leases would

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[119] See generally H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927), which convincingly refutes the highly philosophical objections to this view based on positivist concepts of sovereignty.

favor their position. That is the conclusion of this paper. To trace the route by which it is reached, we must resort to the techniques of the comparative lawyer.

The comparison, in this instance, will be between United States municipal law on cancellation of federal leases and the traditional rules of international law protecting the sanctity of contracts. As international law is partly a synthesis of the elements common to the law of civilized nations, American municipal law is to some extent ancestral to international law. If the comparison shows, as I believe it does, that administrative cancellation does not accord with those traditional rules of international law (or general principles of law recognized by civilized nations), it endangers the sanctity of international concession agreements. The international rules protecting the concession's sanctity become subject to redefinition if it turns out that one of the premises upon which they are theoretically based, the important body of municipal law in force in America, is not what it has been supposed to be.

Historically, unilateral state action affecting concession contracts has contemplated either complete abrogation, or a lesser modification of the original agreement. An example of complete abrogation is the 1951 nationalization by Iran of the interests of the Anglo-Iranian Oil Company. The nationalization came about as the result of Anglo-Iranian's refusal, with British Government support, to renego-

tiate its very old concession so as to give Iran a royalty comparable to that being received by surrounding states, which had granted concessions at a later date.[120] We have already encountered an example of a state attempt to effect a lesser modification of a concession in the facts underlying the Saudi Arabia-Aramco arbitration.[121] In another more recent example, a Libyan royal decree in direct conflict with the terms of concession agreements then in effect was acquiesced in by the concessionary oil companies operating in that country. It is the traditional practice of the international oil business for producers to sell their oil at varying discounts off a "posted" price. The posted price is a fictitious figure and sale prices never actually reach it. The royal decree, made in 1965, called for an income tax to be based on the posted price, not on the price the concessionaires actually received for their oil. Despite the fact that the concessions stated expressly that no amendment or repeal of Libyan law subsequent to 1961 could alter the companies' rights without their consent, the companies granted their reluctant consent to modify the concessions in accordance with the decree. Their consent was obtained through various governmental threats. Chief among them was a threat to bar all exports of

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[120] B. SHWADRAN, THE MIDDLE EAST, OIL AND THE GREAT POWERS 103-52 (1955).

[121] See p. 34 supra.

Libyan oil.[122]

Whether the state completely abrogates the concession or only invades some lesser right granted by it, it will usually justify its action under some theory of the rights and duties of sovereignty, or by arguing that the concession does not in fact grant the right contended for by the company. The latter type of argument need not detain us. International judicial or quasi-judicial tribunals evaluate such arguments using rules of construction similar to those with which every American lawyer is familiar. The theories of sovereignty used to advance the proposition that the state has absolute power over concession contracts have been discussed earlier.

Each body of "non-national law" (to coin a term denoting the bodies of law, except for municipal law, which may apply to an international contract) previously discussed contains the principle Pacta sunt servanda and the doctrine of acquired rights. Taken together, these two great principles are the arsenal providing virtually all the weapons a lawyer must use to fight on the side of sanctity of international contracts.[123] A lawyer representing the state could

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[122] J. HARTSHORN, OIL COMPANIES AND GOVERNMENTS 17-26 (1967).

[123] See RAY 47, which substitutes "the contract is the law of the parties" for the doctrine of acquired rights.

lock-up the arsenal or blunt the edges of his opponents' weapons, by showing that United States law does not recognize those principles on the municipal level, in situations analogous to concession disputes.

It may readily be seen that the closest analogue of the overseas oil concession within the United States is the federal oil and gas lease. Both the federal lease and the concession involve a state on one side and a private party on the other. They both have as their subject matter hydrocarbons owned by the governmental party, and they both seek to deal with that subject matter in the same way.

The United States Government in issuing a lease and the foreign government in granting a concession have the same motives. They want development of the national hydrocarbon resources and they want revenue. They have decided to satisfy these objectives by attracting private capital to the task of development and retaining a share of any oil and gas produced. It is true that underdeveloped countries have little choice about adopting a system which will attract foreign private capital to the development of their resources. The United States, unlike them, is not necessarily forced to seek foreign or even private capital. The fact remains, however, that it has chosen a method of resource development very similar to the overseas concession.

It goes almost without saying that the motives of the private parties, the federal lessee and the concessionaire, are the same. They hope to find enough oil and gas to repay the expenses of development and yield a profit.

With a similarity of objectives underlying both the concession and the federal lease, it is not surprising that they are essentially similar in form. They both grant a right to explore for oil and gas over a specific area for a specific time, during which rental payments are called for. They both continue in effect after the period of exploration, provided profitable production exists. The federal lease continues indefinitely, whereas the concession is ordinarily limited to a very long term of years. Both reserve a royalty to the government, measured by the amount of production. Federal leases and overseas concessions are similar enough to have been grouped together in the expression "concession - leasing system."[124]

If the motives of the parties and the forms of the concession and the federal lease are similar, the expectations each party has concerning the party on the other side of each agreement are more similar. The United States Government and the foreign government expect that the private party will serve his own self-interest and seek

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[124]Carlston, supra note 3, at 622.

a profit, thereby effecting the purpose of the lease or concession. On the other side, the private parties expect that the government will keep them secure in their title, thereby making a profit possible and a large investment prudent. That expectation on the part of the federal lessee has been shaken by United States Supreme Court approval of administrative cancellation for pre-lease events.. The expectation of the overseas concessionaire would also be shaken, were that judicial approval to be translated into "non-national" terms.

Support for Attacks on the Concession

We now turn to an assessment of the effect of administrative cancellation in the United States on Pacta sunt servanda and the doctrine of acquired rights as found in the several systems of "non-national law." But before doing so, and before coming down too hard on the cases approving administrative cancellation, it would be wise to examine, in a general way, United States law on the binding nature of state contracts as it existed prior to those cases. This is especially necessary because earlier decisions of the United States Supreme Court have actually been cited in support of the proposition that a sovereign state may legally repudiate its contracts.

The citations referred to are found in Frank Hendryx' 1959 paper presented to the First Arab Petroleum Congress.[125] The body of

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[125]Note 27, supra.

"non-national law" he espoused for concession contracts was international law, which he defined for that context as the common practice of England, France, and the United States. Citing six Supreme Court cases, he asserted United States law supported his conclusion that:

> . . . the purpose for which governments exist, the service of their peoples, requires that on proper occasion those governments must be released from or be able to override, their contractual obligations. So strong is this requirement that it will override Constitutional provisions, which would apparently deny the possibility of release.

The Constitutional provisions which Hendryx subordinates to a sovereign right to avoid state contracts are, of course, the prohibitions against the taking of property without due process of law found in the Fifth and Fourteenth Amendments to the United States Constitution.[126]

However, Hendryx' conclusion about United States law is not supported by the cases he cites. Only two of the cases, Douglas v. Kentucky[127] and New York & N. E. R.R. v. Bristol,[128] actually involve types of state contracts; a lottery grant and a railroad charter, respectively. The Court upheld a state revocation of the grant in Douglas and a state modification of grade crossing regulations in Bristol. The Court felt both cases arose from valid exercises of state police power to protect the public health and morals. The cases stand only for the

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[126] U. S. CONST. amends. V, XIV, § 1.

[127] 168 U. S. 488 (1897).

[128] 151 U. S. 556 (1894).

well known proposition that rights of property are subject, even under the Constitution, to state police power. They certainly do not support Hendryx' conclusion that a government has a right to repudiate contracts whenever it would be in the people's best interests -- economic interests included -- for it to do so. The other four cases he cited were not in point, dealing as they did with private contract rights and the limits upon state action affecting them.[129] It has been observed that Hendryx did not cite the 1935 case of Perry v. United States which held squarely that the Government has the power to bind itself contractually, as an attribute of its sovereignty, and that a state contract once made is not subject to repudiation.[130]

Apparently Hendryx' pronouncements met with very little approval when they were made.[131] They did not reflect prevailing opinion on the basic principles of "non-national law" in general. Nor, as we have seen, did they reflect a true picture of United States law in particular. Had the Supreme Court cases on administrative cancellation

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[129] W. B. Worthen Co. v. Thomas, 292 U. S. 426 (1934); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921); Mugler v. Kansas, 123 U. S. 623 (1887); Pierce v. New Hampshire, 46 U. S. (5 How.) 504 (1847).

[130] Kissam & Leach, supra note 2, at 302, citing Perry v. United States, 294 U. S. 330, 352 (1935).

[131] RAY 62.

been available to Hendryx in 1959, his thesis would have been stronger.

Although qualifications will be in order later on, the broad statement that Boesche v. Udall stands on the side of administrative efficiency as opposed to the traditional safeguards of property rights is beyond doubt.[132] The Court's concern for administrative efficiency is explicit:

> Recognition of the Secretary's power here serves to protect the public interest in the administration of the public domain. Cancellation of this kind of erroneously issued lease gives effect to regulations designed to check the undue splitting up of tracts, which might facilitate frauds, hinder the development of oil and gas resources, and render supervision very burdensome.[133]

This invocation of "public interest" to support an administrator's cancellation of a lease sounds very much like a domestic echo of what, in the "non-national" context of a concession dispute, would be a claim of sovereign right and duty. A sovereign right to override its own earlier law, that is, and a correlative duty to do so whenever the interests of its citizens would be advanced thereby. However, the above quoted statement does not reflect the central holding of the case and would, therefore, be but weak support for the proposition that the United States Supreme Court has aligned itself with the sweeping theories of absolute sovereignty found in the realm of concession

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[132] 373 U. S. 472 (1963).

[133] Id. at 484.

contracts. Much more certain it is that the decision undermines the traditional safeguards of contract and property rights, thus helping to pave the way for the successful assertion of theories of sovereign right. Either expressly or by implication the Court's opinion denied the protection of the domestic equivalents of Pacta sunt servanda and the doctrine of acquired rights to the domestic instrument most closely analogous to the overseas concession.

The common-law manifestation of the doctrine of acquired rights in the United States federal system finds statement in the Constitutional requirement that governmental action affecting property rights must be in accordance with due process. Lessee attempts to analogize the federal lease to a land patent, coupled with invocations of Constitutional due process to protect it, were, viewed from the outside, simply attempts on the municipal level to show that the federal lease is property of the sort protected by the doctrine of acquired rights. Such an analogy was offered to the court in Pan American Petroleum Corp. v. Pierson[134] and accepted, with the consequence that a federal lease was found to be immune from administrative cancellation not specifically authorized by law. Offered to the District of Columbia Circuit, the same analogy was rejected, with the consequence that cancellation for a pre-lease event was upheld as an

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[134] 284 F.2d 649 (10th Cir. 1960).

attribute of the general governmental power over public lands, exercised through the agency of the Secretary of the Interior.[135] In the course of resolving this "seeming" conflict in favor of the latter position, the Supreme Court expressly rejected not only the land patent analogy, but any other characterization of the federal lease which would lend to it the traditional protections afforded rights of property.[136]

The Court considered it unimportant to say what legal interest was created by a federal oil and gas lease. However, the Court did say what it felt that interest was not. It was not an interest free of administrative control, even to the point of being subject to termination without specific legislative or judicial authority. The Court felt this conclusion followed from the facts that leases do not divest the United States of the full fee in the land or the underlying minerals and that the Mineral Leasing Act directs the Secretary of the Interior to supervise operations on the land during the life of the lease. In other words, the interest of the federal lessee, although undeniably an interest in real property, is not the sort of interest entitled to have its terminal event identified only by courts of law, which alone

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[135]Boesche v. Udall, 303 F.2d 204 (D.C. Cir. 1961).

[136]Boesche v. Udall, 373 U. S. 472, 477-78 (1963).

can rule in accordance with due process of law. Rather, because it never ripens into a full fee in land or minerals and because it is subject to stated statutory conditions, it remains subject to termination by administrative action upon the occurrence of conditions not stated.

This conclusion of the Supreme Court would lose very little in translation to "non-national" terms. Like the federal lease, the overseas concession never ripens into any sort of fee. Indeed, it does not approach a fee as closely as does the federal lease because its term is not indefinite during production but rather is a specified period of years. Also like the federal lease, the concession usually contains specific, continuing conditions dealing with operations. Following the same line of reasoning used by the Supreme Court in Boesche, and relying on its contribution to the applicable body of "non-national" law, the government's advocate in a concession dispute could argue that the interest of the concessionaire, however it might be characterized, is not of the sort protected by the doctrine of acquired rights from unilateral termination by the state.

The potential damage done by Boesche v. Udall to the "non-national" maxim Pacta sunt servanda is less obvious than its damage to the doctrine of acquired rights. However, the possibility of damage to the former can be found in the opinion by a process of inference.

As we have seen, there is a view of Pacta sunt servanda

which holds that the [illegible] merely invites a special case of the [illegible] doctrine of acquired rights.[137] The special case to which it seems to be identified by the mode of exploitation of the right appears [illegible] as opposed to such things as grant or descent. Accepting this view, _____ removes any protection the concession might claim from _____ in the same way and to the same extent as it removes from it the protection of the doctrine of acquired rights. Such an argument is made especially forceful by the fact that the Court said it was not important to characterize the nature of the lessee's interest in order to decide whether it was inheritable or was [illegible] to be construed only in terms of law. Whatever the [illegible] of the lessee's interest and whether acquired by grant or by [illegible] it was declared terminable by [illegible] means.

Even if _____ is taken as being [illegible] apart from the doctrine of acquired rights, the damage done by _____ to the [illegible]'s protection of concessions [illegible] is readily discernible. It is certain from the decision that [illegible] did not apply the domestic equivalent of _____ to the federal lease before it. We know this simply from the fact that the Court refused to enforce the lease against the Government. More precisely, refused to allow any court to enforce it. But we cannot

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[137] See p. 27 supra.

tell from the opinion exactly how, logically, the Court avoided enforcing the lease. The opinion is silent on whatever contractual nature the lease may have. The Court does not say it is a contract, but, on the other hand, it does not say it is not a contract. The Court avoided the common-law equivalent of the doctrine of acquired rights by expressly classifying the lessee's interest as something other than a vested property right. But it did not, in a similar way, avoid the common-law equivalent of Pacta sunt servanda by classifying the lease, expressly at least, as something other than a contract. The silence of the opinion on the contractual nature of the lease makes it necessary to explore two alternative routes the Court could have followed in avoiding enforcement of the lease. One such route would be to deny the federal lease the status of a contract and to bar it therefore from being enforced as such. The other route would be to grant the lease the status of a contract but to imply terms into it which allow cancellation by the governmental party in a fact situation like that present in the case. Either route can explain the result of Pocahe v. Udall, and the logical consequences of either route can harm Pacta sunt servanda as a safeguard of the overseas concession.

If, as seems likely, the Court views the federal lease as something other than a contract, we are almost forced to conclude that it has been reduced to the status of a revocable license. We have

already seen that the Boesche opinion largely eliminates the only other alternative, that of a vested property interest. There are licenses which courts will protect from revocation under certain circumstances. However, to be so protected they must contain, in addition to permission to do something, some element of contractual safeguard or of proprietary interest in the subject matter of the license. Since we have eliminated the former element for purposes of discussion, and since the Court itself apparently eliminated the latter element, we have left to consider only the revocable or "bare" license.[138]

If the Supreme Court has in fact classified the federal lease as a bare license, the question of what effect a translation of that classification into "non-national" terms might have on the protection offered the concession by Pacta sunt servanda virtually answers itself. Viewed as a license, the concession could claim no protection under the maxim because it is inapplicable by definition to a transaction having no contractual aspects. The oil company operating under a concession license, as opposed to a concession contract, could, like the federal lessee, look only to local statutes and administrative regulations to determine the extent of his license. That determination would be exceedingly difficult if the local administrator's interpreta-

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[138] See generally 1A SUMMERS, supra note 77, at § 154.

tion of his regulations were accorded the latitude there that similar interpretations are accorded here. This point will be discussed in more detail shortly. For now, suffice it to say that whatever help a concession-license might get from local administrative regulation would be without assistance from Pacta sunt servanda.

Following the second route by which the Supreme Court may have denied judicial enforcement of the lease in Decache v. Udall, we assume the federal lease is a contract and attempt to identify the basic characteristics of the rule the Court formulated in order to effect the denial.

The terms of the federal lease as a contract are not found entirely, or even primarily, within the instrument itself. Instead, they are largely spelled out by the Mineral Leasing Act, which, together with the administrative regulations validly issued pursuant to it, sets the conditions of the Government's promise and the requirements for the lessee's performance. Exact meaning is given to those contractual terms by the law of the land, which, in the United States, is synonymous with court decisions applying former precedent and enacted legislation. By reference to court decisions construing statutes and defining the bounds of administrative discretion, the prospective lessee should be able to discover the meaning and predict the effect of any lease he may enter into. Since entry into a contractual

relationship presumes consent by the parties and since valid consent requires knowledge of what is being consented to, the existence of a lease-contract presupposes that the lessee knew or was able to discover the meaning of his act through an examination of the law. That presupposition was not made by the Court in Boesche v. Udall. The decision inserted a term in federal leases the meaning of which the lessees could not have ascertained from the law of the land. The lessee in that case was held, in effect, to have consented to a lease term allowing administrative cancellation for pre-lease events when in fact he could not have done so. When his lease was issued the lessee could not have consented in fact to be bound by a secretarial interpretation not yet made, nor could he have consented constructively to a future interpretation which would not have to accord with the law he is presumed to know. Thus, if the lease is viewed as a contract, the Court in the Boesche case simply denied it enforcement by implying a term it could not logically contain.

CONCLUSION AND RECOMMENDATION

When the Secretary of the Interior exceeded the authority given him by the Mineral Leasing Act and cancelled federal leases for causes not specified in the law, he violated basic common-law protections of vested property rights and contracts. When the Supreme Court confirmed such a cancellation in Rescsche v. Udall, an important weapon was placed in the hands of those who seek to remove the analogous foreign oil concession from the protection of the international equivalents of those common-law doctrines. Applying this American precedent through any of the avenues by which our municipal law can enter the construction of a concession agreement, the proponents of inherent state power to abrogate or modify concessions can gain valuable support. They can cite a case from our highest court which denies to the domestic analog of the concession the status of an instrument conferring a vested property right. This would be a strong retort to arguments supporting the concession on an acquired rights theory. They can cite the same case for the proposition that our law would not view the concession as a contract; probably only as a license. That would answer a defense of the concession on a Pacta sunt servanda theory.

The solution to the problem probably does not lie within the competence of Congress. Certainly, it would be a relatively easy matter for Congress to cure the immediate evil in our domestic law occasioned by the decision in Boesche v. Udall. Such a cure could be effected by an amendment to the Mineral Leasing Act spelling out a requirement for resort to judicial process for all cancellations. Specific categories of cancellations could even be allowed to the Secretary acting alone, if that were the desire of Congress. As long as these categories are described in the law with particularity, security of title in federal leases would not be shaken, although obtaining the leases themselves might become less attractive. But, desirable as this legislative remedy might be from a domestic standpoint, it probably would not obviate the difficulty we have traced for the holders of overseas oil concessions.

Viewed from afar, from the standpoint of one who is analyzing the basics of the American concept of law to discover its effect on the "non-national law" of the concession, the implications of the Boesche decision would remain even after the domestic consequences of the decision had been erased through legislation. What the international practitioner would be seeking in his examination of the case is not precedent in the strict sense, but rather authoritative opinion on the legal nature of the concession's domestic cousin. Whatever

Congress says after the decision, the opinion remains and, coming from the Supreme Court, the final arbiter of jurisprudence in the United States, it would certainly be authoritative.

If the answer to the international problem created by this aspect of the law of administrative cancellation of the federal lease lies anywhere, it lies with further action by the Supreme Court itself. Only that body can, in a proper future case, overrule what it uttered or clarify what it appears to have uttered by way of opinion on the basic nature of the federal oil and gas lease. Actually, the Supreme Court left itself the opportunity to take such future action by confining its decision in Boesche v. Udall closely to the facts presented.[139] A slightly changed fact situation could give the Court a chance to make clear that it has not aligned itself with a legal philosophy which would broadly deny the federal lease the status of a vested right upon its issuance or of a contract with terms defined by law.

At any rate, this is what I recommend, recognizing that it is more in the nature of a plaint than a recommendation. Boesche v. Udall is a shot apparently not yet "heard 'round the world," but unless corrective action is taken, its reverberations will continue, awaiting only receptive ears.

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[139] 373 U. S. at 485.

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